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IN THE

Supreme Court of the United States

October Term, 1970
No. 1463

DEKAR INDUSTRIES, INC., A & E PLASTIK PAK CO., INC., JOSEPH DEKEL and YEHOCHAI SCHNEIDER,

Petitioners,

vs.

BISSETT-BERMAN CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONERS FOR WRIT OF CERTIORARI.

ARGUMENT.

Petitioners, as additional reasons for granting the Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, and in reply to the "Brief for Respondent in Opposition" hereby respectfully state as follows:

(1) The inferences and innuendos sought to be injected into the Record by Respondent (BBC) on pages 4 and 5 of its brief, should be clarified. Petitioners admittedly planned to compete with BBC and bought materials and supplies from public stores in order to do so. They openly sought financing and com-

municated their plans to BBC. The statement that Petitioners engaged in ". . . procurement and appropriation" found on page 4 of BBC's brief, is a false statement since these supplies could be purchased by anyone. No property of BBC was taken and the record citations reflect this. None of the "examples of proprietary information" referred to on page 5 of BBC's brief, reflect the use of any property or information which is exclusive to BBC and the best example of this contention is Sel Rex BDT, the so-called "trade secret" which is a publicly sold gold-plating bath.

(2) On page 9, BBC makes a false reference to "findings of fact and conclusions of law". It is undisputed and uncontroverted that the District Court never made findings of fact and never made conclusions of law and the reference in BBC's brief to such documents is a false reference.

(3) BBC's brief should be read in conjunction with its motion for secrecy of its sham "trade secret" Sel Rex BDT. BBC, in its motion for secrecy, informed the Supreme Court of the astounding contention that Sel Rex BDT, admittedly a commonly sold commonly known trademarked gold-plating bath, is one of its so-called "trade secrets", for the use of which Petitioners will be subject to imprisonment for contempt, since, as stated on page 2 of BBC's motion for secrecy: "This gold plating process has been held in the order for preliminary injunction to be included in Respondent's trade secrets". BBC's brief should be read and understood with reference to the only "trade secret" exposed to this Court since neither Sel Rex BDT nor any other specific trade secret claimed is specified by the injunction. Every piece of technology that BBC has claimed as a trade secret (claims which BBC would not even

dare to make before the technically oriented U. S. Patent Office) throughout the entire proceedings below, is of the same or lower caliber than Sel Rex BDT. Consequently, the Supreme Court may consider the Petition for Certiorari with the specific "trade secret" lurking behind the "blank check" terms of the injunction as revealed by Sel Rex BDT, the publicly sold, publicly trade-marked gold-plating bath. Sel Rex BDT strips away the tyranny of words and provides the Supreme Court with a view of the result of the abdication of the judicial function in the Courts below *and its effect upon the mobility of the nation's technicians, scientists and engineers from one employment to another.*

(4) Sel Rex BDT has thus crystallized all of the reasons for granting the writ set forth in the Petition. Denial of the Petition will allow to remain as law in the Ninth Circuit a new law of Federal injunctions and trade secret protection with no findings of fact or conclusions of law to comply with the mandatory Rule 52(a) and with the trade secrets" eliminated from the injunction order itself in violation of *Federal Rules of Civil Procedure* §65(d). The motion for secrecy papers and the record below reveal that Sel Rex BDT is undisputedly a commonplace commercial product known as the number one industry choice for the manufacturing purpose of non-porous gold-plating, known not only to professional scientists and technicians like Petitioners (BBC's former employee and former subcontractor) but that Sel Rex BDT is also the commonplace knowledge of manual workers and clerical help throughout the industry. Is it to remain as the law that this commonplace commercial industrial gold-plating produce may not be used for gold-plating by Petitioners once they have served their two to three

year term of employment and subcontracting with BBC? Is it to remain the law in the Ninth Circuit that the technical knowledge of a commercial product known to all in the industry and which would readily occur to professionals as applicable to BBC's product, be subtracted from the public domain and the public domain technology open to Petitioners thereby be reduced in order to grant BBC trade secret protection? Can Petitioners be subjected to jail and fines as their penalty for contempt for using Sel Rex BDT for the production of electrolytic cells? BBC's brief and the Courts below have all responded to these questions in the affirmative.

(5) Professional careers of the nation's scientific employees and subcontractors are severely limited if the first prime contractor has the power to subtract from the public domain the best known and most useful commercial products availed of by him. Their expertise and professional knowledge can be destroyed at the whim of the prime contractor without any judicial determination of the trade secret claims under the procedure here approved. If, without findings of fact or conclusions of law and with no specificity in the injunction, this commonplace public domain commercial product is the trade secret of BBC, then the Petition must be denied. It will then be the law in the Ninth Circuit that a commercial product known to thousands of gold-platers everywhere has been subtracted from the public domain as far as Petitioners are concerned. These Petitioners are thus barred from purchasing this commonly sold gold-plating bath which is available to everyone else and which was available to them before they had their brief contractual arrangement with BBC which resulted in the injunction.

(6) May the Federal Court, despite *Federal Rules of Civil Procedure* §§52(a) and 65(d), as urged by BBC in its brief in opposition to the Petition for Certiorari, delegate to BBC the judicial acts of "informing" Petitioners what is enjoined? Are Petitioners required to read into the injunction at their peril what "it ill behooves" them to do or are the Federal Courts required to know and specify what they are enjoining? The Ninth Circuit opinion approved a "blank check" injunction (stating on the face of the opinion that "the specific trade secrets are not set forth") and delegation of the determination of the acts restrained to BBC and BBC has "informed" Petitioners that Sel Rex BDT is the trade secret protected. All other "technology" of which the Petitioners have been informed by BBC is of a similar or lower caliber.

(7) Do *Lear v. Adkins* and the *Sears-Compco* cases permit commonplace commercial products such as Sel Rex BDT known to professionals, manual workers and clerks in the gold-plating industry throughout the United States, to be the trade secrets of BBC? If so, the Petition for Certiorari should be denied. On the other hand, if *Lear v. Adkins* requires that these common commercial products be available for lawful competition by all, including former subcontractors and the ex-employee scientists and technicians who wish to compete with their former employer, then the clash of conflicting opinions in the nation's Circuit Courts must be clarified, the Petition must be granted, the judgment below reversed, and the nation's scientists, technicians and engineers restored to mobility.

(8) Respondent's brief refers to non-existent "specific facts" never found by the Court below and to "applications of law" thereto which ever occurred in

the Courts below. BBC's brief may be summarized by the single sentence appearing therein at page 9 where it is stated that "The District Court and the Court of Appeals have clearly held that the acts to be restrained are described in reasonable detail in the Order for Preliminary Injunction and that the findings of fact and conclusions of law are sufficient for an understanding of the order". This statement is, of course, clearly contrary to the truth. It should certainly need no further reiteration at this point of the fact that there *never were any findings of fact or conclusions of law in this case whatsoever.* Reference to the colloquy between the District Court and Petitioners' counsel of January 19, 1970 found in the Appendix to the Petition for Certiorari at pages 14 to 17, reveals that the District Court frankly admitted that it did not know what it had enjoined and that *it did not expect the Petitioners or their attorney to be informed thereof.* It is true that the Court of Appeals' opinion makes vague references to "findings" which do not exist in the District Court Order for Injunction but the Court of Appeals was referring to recitals contained in the Order which had been copied from the Temporary Restraining Order granted *ex parte.* The Court of Appeals frankly admits that neither it nor the District Court knew what was being enjoined when it states in its opinion that "The specific trade secrets are not set forth".

(9) BBC's brief relies primarily on the contention that Petitioners merely object to "the application of the law to the specific facts". *On the contrary,* Petitioners object to the "non-application of the law" and to the erroneous refusal to apply Federal law (*Federal Rules of Civil Procedure* §§52(a) and 65(d)), State law

regarding burden of proof (*Futurecraft v. Clary*),[1] State law on specificity (*Diodes v. Franzen*),[2] Federal law on public domain technology (*Lear v. Adkins*)[3] and State law prohibiting non-competition agreements as well as Federal Patent and Anti-Trust Law.[4] Petitioners object to the abdication of the judicial responsibility by the District Court and the approval by the Court of Appeals of this abdication. The existence or non-existence of any specific trade secret has never been judicially determined by any court below. Yet, these are the "specific facts" upon which Respondent's entire trade secret case must stand or fall.

(10) BBC has once more, in its brief in opposition to the Petition for Certiorari, wheeled out the argument which has thus far been so successful in intimidating a non-technically oriented judiciary, when it argues at page 11 of its brief herein that to require compliance with Rule 52(a) and Rule 65(d), the injunction ". . . would become a manufacturing specification which would be unwieldy and difficult if not impossible for the Court to administer . . .". Thus, with tongue in cheek, with one foot in the United States Patent Law with its four granted patents, it plants its other boot in the trade secret law and monopolizes the technology which the U.S. Patent Office rejects as unworthy. But Sel Rex BDT puts the light of truth on BBC's so far successful effort at obtaining the blank check non-judicially determined injunction. By application of the existing laws and rules, both Fed-

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[1]205 Cal. App. 2d 279, 23 Cal. Rptr. 198.

[2]260 Cal. App. 2d 244, 67 Cal. Rptr. 19.

[3]395 U.S. 653.

[4]See Points and Authorities spelled out in Petition for Certiorari.

eral and State, the District Court could have made prompt and efficient disposition of the case and the initial step therein would have been a granting of the motion for specification which was three times denied by the District Court. The claim that specification would have produced "an unwieldy manufacturing specification" is contradicted by the fact that BBC has only a single 6 page affidavit as support *for* its entire trade secret case!! [R. 1426-1437]. The discredited Callahan Affidavit [Record pp. 1426-1437], does not constitute "an unwieldy manufacturing specification". But that Affidavit is such an obvious sham that it could not have survived the most superficial test of judicial determination had the judicial process of making findings of fact or conclusions of law ever been attempted at any stage of the proceedings. The demonstration is amply made before this Court by BBC's claim to own as its very own trade secret Sel Rex BDT, the commonly sold gold-plating bath.

(11) *Federal Rules of Civil Procedure* §§52(a) and 65(d) which were bypassed by the Courts below after the "unwieldy manufacturing specification" intimidation succeeded, are Rules that are mandatory under the cases cited in the Petition and the refusal to apply them in this case not only deprived Petitioners of the due process of existing laws but also reduced these Rules to a nullity. Since the burden is on BBC, the party claiming the trade secrets, if it would require in fact (which it would not) an "unwieldy manufacturing specification" to specify Respondent's trade secrets, then the injunction must contain that specific and isolated portion of the "unwieldy manufacturing specification" which is being specifically protected under penalty of contempt. Compliance with 52(a) and 65 (d) would have forced BBC to enter the Court with

a legal presentation which a non-technical Court could easily master within a short period of time or BBC would not have met its burden of proof for any protection whatsoever.

12) The Ninth Circuit opinion on its face approves the "blank check" injunction, approves enjoining acts which the Court does not know or specify, and approves a rule that Federal Courts may defer up until the contempt hearing the first judicial determination of what acts are enjoined. It approves delegation to the trade secret plaintiff the judicial function of "informing" Petitioners of what the unspecific trade secret injunction intends to prohibit. The rationale in the Ninth Circuit opinion is the "ill behooves" cliche which results in public domain items, of which Sel Rex BDT is the prime example, being denied to persons who have spent a lifetime in this type of technology.

(13) BBC's claim to trade secret rights in the non-patenable portions of its "unwieldy manufacturing specification" was a calculated deception of the non-technically oriented judges, which successfully intimidated them from making any judicial determination whatsoever of the specific trade secrets whose lawful existence or non-existence determine the issues of this case. By the use of generalized statements (which are barely hedged from outright falsity by ambiguous qualifying clauses) BBC declared that Sel Rex BDT is its trade secret and its use must be denied to Petitioners Frick and Dekel. Thus, BBC duped the Courts below into incorrectly thinking that they had to choose between the following:

(a) Granting BBC the "blank check" injunction by bypassing 52(a) and 65(d).

(b) Undertaking a monumental exploration of technology.

Actually, if BBC failed to carry the burden of proof, and if BBC's attorneys and technical experts did not provide the Trial Court with isolated specific well-supported trade secrets, then, of course, the burden of proof failed and the injunction had to be denied. The trial judge's task was simple if it required strict compliance with Federal and State law, both procedural and substantive, and especially the requirement of placing the burden of proof exactly where it belonged. The Courts below mistakenly believed that the "blank check" injunction was the only way they could escape endless scientific and technical study for which their time was limited. In truth, all of these burdens were on BBC and BBC never met them since it succeeded in intimidating the Court with the "unwieldy manufacturing specification" argument which BBC states it would be "difficult if not impossible for a Court to administer". What BBC is stating is that the Courts cannot administer justice at all in trade secret cases which is not true. The opposite is true since it is relatively easy for a Court to enforce an injunction which specifies the acts restrained and impossible for a Court to enforce with due process, an injunction granted without the Court knowing what it has enjoined.

(14) All of the "specific facts" referred to by BBC pertain to acts by Petitioners preparing to compete with BBC by means which were perfectly lawful unless they were accompanied by the misappropriation of trade secrets, whereas no trade secret has ever been judicially determined to exist. The "hearing" referred to in BBC's

brief was a hearing of oral argument by attorneys only. The District Court never heard the testimony of any witnesses and the Appeal Court can examine the written affidavits and other material before the Court free of any inference that there were credibility determinations below, since no oral testimony was heard on the motion for injunction.

(15) The District Court bypassed all judicial determination of technology at the Interlocutory Injunction stage for the reason that it was intimidated by BBC's deceptively inflated claims to trade secret rights in its entire manufacturing process. The Court's abdication in the face of intimidating technology resulted from failure to require the Respondent to carry its burden of specificity and isolation and that burden upon BBC was in direct proportion to the magnitude of the trade secrets claimed. Had that burden been properly imposed by the Court below, the Court's task would have been relatively simple. Instead, the Court granted a maximum injunction wherein the prohibited acts defy comprehension.

(16) BBC's brief refers on page 5 to "particular examples of proprietary information". This is a false statement of the law not supported by citation to any authority since there exists none. California does not have any "proprietary information" law. In California, the trade secret plaintiff has the difficult burden to fully specify each of its trade secrets, to isolate each specified trade secret from readily ascertainable technology, and to meet the other trade secret requirements of the Law of California. *Diodes v. Franzen,* 260 Cal. App. 2d 244, 67 Cal. Rptr. 19; *Futurecraft v. Clary Corp.,* 205 Cal. App. 2d 279, ... Cal. Rptr.

198 (1962); *Sarkes Tarzian v. Audio Devices Inc.*, D.C. S. Cal., 155 F. Supp. 250, 119 USPQ 20 (1958) aff'd 283 F. 2d 695, cert. den. 265 U.S. 869. Neither Sel Rex BDT nor any technology ever named by BBC could qualify as a trade secret under California law since like Sel Rex BDT, none of it could meet that portion of the test which the Court correctly stated in *Sarkes Tarzian:*

> ". . . A trade secret . . . is of a character which does not occur to persons in the trade with knowledge of the state of the art or which cannot be evolved by those skilled in the art from the theoretical description of the process, or compilation of compendia of information or knowledge".

(17) Since the District Court made no findings of fact or conclusions of law, this Court cannot know whether or not the claimed "trade secrets" consisted of manufacturing techniques which should have been inserted into the patent applications filed January 12, 1967 with respect to United States Patent No. 3423644. Consequently, BBC's claim on pages 7 and 8 of its brief that ". . . Respondent has set forth the best mode of carrying out the invention . . . at the time of filing the patent applications" cannot be reviewed here. The District Court should have made findings of fact on the subject of whether any of the claimed trade secrets were included in the patent applications or should have been included therein as the best mode of carrying out BBC's inventions. The injunction order, if for no other reason, must be reversed for this reason alone. Otherwise, trade secret protection may be given for that which should have been included in the application for patent under the rules applicable to such applications.

(18) On page 8 of its brief, BBC cites three cases which have nothing to do with trade secrets but which were solely concerned with the question of whether or not the patent involved in the suit was invalid for failure of the patentee to disclose the best method of practicing the invention that he knew at the time of the filing of the applications. These three cases are *Adams v. U.S., Benger Labs. v. R. K. Laros Co.,* and *Englehard Industries Inc. v. Sel-Rex Corp.* In the *Englehard v. Sel-Rex* case, the Sel Rex patent was held invalid under circumstances very similar to this case, inasmuch as the Court refused to believe the past owner's claim that the patent application disclosed the best method of practicing the invention in the patent application where it was shown that the applicant knew of a method subsequently found to be better. BBC never dared to swear that it did not know of Sel Rex BDT or any other specific "trade secret" in January, 1967 when it filed its last patent application. Since BBC failed to meet its burden of proving that these so-called "trade secrets" were unknown to it when it filed its last patent application in January, 1967, the Court should have found that there was a failure to meet the burden of proof and that these were encompassed in the best mode of practicing the invention and consequently must be denied trade secret protection. The Rules of *Sears-Compco* and *Lear-Adkins* prohibit a patentee from obtaining state law protection in addition to the patent protection granted BBC in its four patents, for technological subject matter falling within the scope of these four patents. Otherwise, patent applicants are encouraged to provide disclosures having doubtful operability without practical utility in order to retain trade secret rights. Patent disclosures would be mere laboratory

curiosities if patent preemption does not reach all areas of the public domain which are readily ascertainable by a person skilled in the art and if the application does not require disclosure of the best mode of practicing the claimed invention.

(19) In the present case, BBC claimed, and the Courts below held, that readily ascertainable technology such as Sel Rex BDT may be subtracted from the public domain and that BBC's four patents do not bar trade secret protection for the only known useful and operable way of practicing the invention encompassed in the four issued patents. In addition, BBC's own sworn statements reflect the fact that it knew long before its patents issued in January of 1969 that the patent disclosures were of no utility and questionable operability unless supplemented by the technology which BBC now claims as "trade secrets".

(20) On page 10, BBC cites *Irish v. U.S.* which does not support the decision below but contradicts the holdings. In *Irish,* the Court of Appeals reversed a far more detailed injunction than the one here affirmed.

(21) On page 13 of BBC's brief, in paragraph 6, BBC makes inapplicable citations of the law. In the first case cited, a California case, *Components for Research Inc. v. Isolation Products Inc.,* the Court opinion refers to defendants who were former directors in control of the corporation stating "He took with him drawings and customer lists of plaintiff." In the present case, Petitioners were scientists and technicians employed at will who took with them when they left BBC, nothing but their own expertise, professional skill and the contents of their own minds and there is no allegation or finding that Petitioners took any tangible

property whatever of BBC. As a State court case, it was not required to meet *Federal Rules of Civil Procedure* §§52(a) or 65(d) whereas those rules are mandatory in this case.

(22) On page 13, BBC cites *Winston Research v. Minnesota Mining & Manufacturing*, a Ninth Circuit case. That case not only does not support the present injunction, but under its rules, it is clear that Petitioners were entitled to have BBC isolate its claims and were further entitled to have BBC specify such isolated claims at an early stage of the proceeding. The *Winston* opinion stated in part:

> "The fact that Mincom sought protection indiscriminately for all phases of its development program, and refused Winston's request for a more realistic statement of its claim during the initial stages of Winston's own development, afforded an additional justification for the District Court's refusal to award money damages."

Here there are no isolated and specified claims which meet the standards of the *Winston* case at all. The Court of Appeals opinion itself states on its face that the actual trade secrets are not specified and consequently this case is in direct conflict with the standards set forth in *Winston*.

(23) The value to BBC of the Order for Preliminary Injunction has been great since for 2 years it has already intimidated Petitioners from lawful competition in fear that the District Court may conduct its contempt proceedings as it conducted the Interlocutory Injunction proceedings, to wit, by delegating the judicial function to give meaning to what it enjoined to the unscrupulous trade secret claimant who is delegated

to breathe life into the Injunction which does not state on its face that it enjoins.

(24) If BBC had been forced to carry its burden of proof and if the Court had required the granting of specification by BBC so that the claimed technology involved was isolated from the public domain, BBC's entire trade secret claims, including its claim that Sel Rex BDT was its trade secret, would have collapsed.

(25) BBC's brief states on page 9 that "If Petitioners have any information which would show that any of Respondent's trade secrets are publicly known, they have an obligation to bring this information before the Court." This is a tongue-in-cheek, hypocritical attempt to shift the burden of proof which is placed upon BBC and is not upon Petitioners. BBC also declares that its trade secrets are all of its methods and techniques (with no specific description thereof) and that they comprise an "unwieldy manufacturing specification". It was BBC's burden to make the claim understandable, specific and clear to the trial court and it cannot shirk that burden by using the "unwieldy manufacturing specification" argument and thus take upon itself the task of advising Petitioners what is meant by the injunction. Trade secret litigation can be handled well within the abilities of non-technical judges to administer justice of the Federal and State laws are strictly adhered to, both procedural and substantive.

(26) One cannot fault BBC for taking the same way out which was taken by the U. S. District Court and the Court of Appeals for the Ninth Circuit when

they refused to apply Rules 52(a) and 65(d) or explain why they could be bypassed. Instead, BBC refers to factual material to create the false illusion that a sinister conspiracy existed, all of which factual material is irrelevant if no trade secrets existed. If the Petition for Certiorari is here denied, the process begun in the U. S. District Court becomes complete and the so-called trade secrets, including Sel Rex BDT, the commonly sold gold-plating bath, becomes a trade secret by judicial abdication, the use of which results in Petitioners being subjected to contempt in the Federal District Court.

(27) BBC's "parade of the horribles" approach by dangling before this U.S. Supreme Court the "unwieldy manufacturing specification" argument is expected to have the same petrifying effect on the judiciary here as it did in the Courts below. The Ninth Circuit avoided a judicial determination of whether Sel Rex BDT was a trade secret by its "ill behooves" cliche and swept under the rug the fact that there were no findings of fact or conclusions of law.

(28) The claim that Sel Rex BDT is BBC's claimed trade secret is illustrative of the fact that the claim to monopoly rights in trade secrets is not the abstract difficult "unwieldy manufacturing specification" problem which BBC would like to have this Court believe. Each examination simply reveals the falsity of BBC's contention and the refusal of BBC to elicit specific facts in its brief is simply a further illustration of the evasiveness found in its motion for secrecy and its contemptu-

ousness of the technical competency of the judiciary when it sought to seal all of the records herein under the ludicrous contention that Sel Rex BDT was its private "trade secret".

(29) It is noteworthy that the brief for BBC completely bypasses the issue raised by the fact that this case grants a non-specific trade secret injunction which prohibits the use of public domain items such as the commonly sold gold-plating bath, Sel Rex BDT, while in the *Painton and Company* case cited in the Petition, the Court holds that California courts must obey the dictates of the supremacy clause of the United States Constitution and refuse to enforce trade secrets which are related to items covered by a patent. BBC bypasses this with its overall argument that the only basis of Petitioners' claim is the application of the law, not the law itself. Under BBC's analysis of this case, compared to the *Painton* case, no conflict exists and these are merely cases with different sets of facts and the same law applied thereto. Yet, to the Petitioners, the cases are irreconcilable and in Petitioners' view, *Lear v. Adkins* does not permit the appropriation by BBC of public domain technology by private contract or otherwise. Petitioners respectfully submit that the chaotic views on these fundamental concepts in the District Court and Circuit Courts throughout the nation should be set at rest and that the Petition for Certiorari should be granted.

Conclusion.

Wherefore, Petitioners pray that:

1. The Petition for Certiorari to the Court of Appeals for the Ninth Circuit be granted.

2. That the Order for Preliminary Injunction be reversed *per curiam*.

3. That Petitioners be awarded all of their costs of appeal in the Ninth Circuit as well as in this Court, as well as all other relief which is proper in the premises.

Dated: April 23, 1971.

Respectfully submitted,

MEYER BERKOWITZ and
EDMOND F. SHANAHAN,
By MEYER BERKOWITZ,
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